UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
---X

DOCKET #:11CV 4678 (RA)(THK)

BRADLEY HART,

Plaintiff,

-against-

AFFIRMATION IN SUPPORT OF MOTION TO AMEND

CITY OF NEW YORK, ELIAS NIKAS and JORGE GONZALEZ,

Defendants.
---X

JAMES K. GREENBERG, being duly admitted to practice law before the United States District Court for the Southern District of New York, affirms the following under penalty of perjury:

1. I am a member of the firm of JAMES GREENBERG & ASSOCIATES, P.C., the attorneys for the plaintiff and I am familiar with the facts and circumstances of this case from my involvement with this matter since the inception of the case.

2. I make this affirmation in support of the plaintiff's motion to amend the Complaint to assert causes of action directly against Lieutenant Timothy Browne, Sergeant Seth Lynch and Sergeant "Smalls". In addition, this affirmation is submitted in support of the plaintiff's motion to permit the amendment of the

Complaint to add a Monell claim based on facts revealed during the course of discovery.

3. The Affidavit of the Plaintiff (**Exhibit 1**) and other documents annexed hereto, evince the mistake made by the plaintiff in his pleading of his case. In addition to that mistake, we wish to point out in these papers that the facts revealed during discovery support the propriety of a Monell claim against the City of New York.

4. The facts that underlie this action are simple: the plaintiff was arrested on April 17, 2009 at his home, based purely on complaint filed by Paul Johnson in which he is alleged to have telephoned Mr. Johnson and said "I'm giving you a courtesy call to let you know I'll be banging with the hammer for another 20 minutes and it's in your best interest not to call 311. I'll have you thrown out of the neighborhood." A copy of the complaint is annexed hereto as **Exhibit 2.**

5. The aforementioned complaint was taken by a civilian. Some time thereafter, a Complaint Report was completed and entered into the system and the alleged offense was categorized as aggravated harassment. That Complaint Report is annexed hereto as **Exhibit 3**.) We do not know who officially categorized the charge, but the name of the civilian who took the report, as well as Sergeant Seth Lynch and Sergeant "Smalls" all appear on the report. We now seek leave to amend the Complaint to add Lieutenant Brown, Sergeant Lynch and Sergeant Smalls as direct party defendants, as it appears that they were somehow involved in legitimizing the complaint report that led to the plaintiff's arrest.

6. We have not had an opportunity to depose the civilian, nor Sergenat Lynch and Smalls, having just learned during the deposition of Lieutenant Browne on August 8, 2012 (two days prior to your Honor's deadline for the completion of discovery) that it he ordered the arrest based on the classification of the charge after confirming that Mr. Hart did, in fact, call Paul Johnson. He also testified that whether or not the call was threatening was a matter of debate. We do not yet have the transcript of Lieutenant Browne and cannot quote his exact testimony at this time.

7. Defendant officer Jorge Gonzalez was with Lieutenant Timothy Browne at the time of the arrest and stated at his deposition that he was only following orders and that Lieutenant Browne had the exclusive authority to arrest Mr. Hart. (Gonzalez EBT, pages 29-30, annexed hereto as **Exhibit 4**.) However, the documents exchanged in this case that pertain to the arrest list Jorge Gonzalez as the arresting officer. (See the "OLBS Arrest Data Elements" printout exchanged by the City, and annexed hereto as **Exhibit 5**.)

8. A "Case Inquiry" form (annexed hereto as **Exhibit 6**) was also exchanged in which Paul Jordan and Timothy Brown are also listed, thus making the plaintiff aware that they were present at the arrest. However, neither one is ever identified as an arresting officer.

9. In the Plaintiff's First Set of Interrogatories, the plaintiff demanded in the 7th interrogatory that the City "[s]et forth the name, rank, badge number and, if no longer employed by the defendant, the last known address of the individual who made the decision to arrest Bradley Hart on April 17, 2009. (A copy of the

interrogatory requests is annexed hereto as **Exhibit 7**.) The Defendants' response to that interrogatory was " . . . that plaintiff was arrested by Police Officer Jorge Gonzalez, Shield #14370." (A copy of Defendants' Responses and Objections to Palintiff's First Set of Interrogatories is annexed hereto as **Exhibit 8**.) Had the defendants identified Lieutenant Browne and/or Sergeants Lynch and Smalls, the plaintiff would have amended his Complaint prior to the expiration of the Statute of Limitations.

10. As already stated in paragraph 5 hereinabove, there has not yet been discovery of the facts surrounding the taking of the complaint by the civilian and the approval of same by officers of the precinct. However, it appears that the civilian who took the complaint was the one who categorized it as aggravated harassment and it was thereafter rubber-stamped up the chain of command. The Penal Law defines Aggravated Harassment in the Second Degree as a telephone call "Without Legitimate Purpose." (See a copy of Penal Law Section 240.30(2) annexed hereto as **Exhibit 9**.) Even a cursory review of the complaint, which states clearly the purpose for the telephone call [as a courtesy to the neighbor because a hammer was being used], would reveal the total absence of legitimate basis to charge the plaintiff with aggravated harassment.

11. We contend that the plaintiff's mistake was understandable in light of the paperwork furnished by the City, which listed defendant Gonzalez as the arresting officer. Moreover, when we asked for the identification of the individual who made the decision to arrest, we were delving further into the process employed

at the precinct in furtherance of the arrest. The response was identification of defendant Gonzalez.

12. In addition to seeking leave to amend the Complaint to add direct party defendants, the plaintiff seeks to an Order permitting him to amend his Complaint to add a Monell claim. The grounds for the request are the NYPD's practice and procedure of having civilians categorizing criminal charges. As is obvious from the facts here, such a practice may then lead to arrest without appropriate scrutiny by those in the chain of command.

13. As indicated in the annexed Memorandum, even anecdotal evidence and the sheer numbers of 1983 actions being filed against the City have been used to justify the plausibility of a complaint alleging Monell claims. Here, we present much more than that.

14. Simply put, not until depositions are done of various City and Police Department officials and the facts elicited (along with statistical data) are analyzed by an expert, can a conclusion be reasonably drawn as to whether the City has an unconstitutional policy and practice in place. We ask this honorable Court to permit the plaintiff that opportunity here.

WHEREFORE, the plaintiff respectfully requests that your Honor grant the plaintiff leave to add Lieutenant Timothy Brown, Sergeant Seth Lynch and Sergeant "Smalls" as direct party defendants, and that your Honor permit the amendment of the Complaint to add a Monell claim against defendant City of New York.

Dated: August 30, 2012
New York, NY

Respectfully submitted,

JAMES GREENBERG & ASSOCIATES, P.C.

s/ filed electronically via ECF

By: James K. Greenberg (JKG7301)
Attorneys for Plaintiff
BRADLEY HART
363 Seventh Avenue, Suite 400
New York, New York 10001
(212)545-7337